Appeal No. UKEAT/0271/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 26 November 2012
Judgment handed down on 17 May 2013

Before

HIS HONOUR JUDGE BIRTLES

MR A HARRIS

MR J MALLENDER

MR S WARD — APPELLANT

THE SECRETARY OF STATE FOR WORK & PENSIONS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR AYOADE ELESINNLA (of Counsel) Instructed by: Equinox Law 719 High Road Leytonstone London E11 4RD
For the Respondent	MR ANDREW MIDGLEY (of Counsel) Instructed by: Field Fisher Waterhouse LLP 27th Floor City Tower Piccadilly Plaza Manchester M1 4BT

SUMMARY

DISABILITY DISCRIMINATION

Disability related discrimination

Direct disability discrimination

Claim for disability discrimination and unfair dismissal. Employment Tribunal upheld one claim of a failure to make reasonable adjustments and dismissed remainder of claims. Appeal principally on the grounds that the ET should have applied the 'but for' test in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 instead of looking for a comparator. Appeal dismissed. This was a claim of direct discrimination and a comparator is required: **London Borough of Lewisham v Malcolm** [2008] 1 AC 1399. In any event **Shamoon** is only guidance and was not relevant in this case.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal by Mr Shane Ward from the Judgment and Reasons of an Employment Tribunal sitting at the East London Hearing Centre in January and February 2012. The Employment Tribunal found that the Claimant's complaint of the Respondent's failure to make reasonable adjustments was well founded and succeeded, but all of his other complaints were dismissed.

2. We heard the case on 26 November 2005 and reserved judgment. We ordered a **Burns/Barke** remission on ground 5, and this Judgment is written with the answer to that remission question.

3. The Claimant is represented by Mr Ayoade Elesinnla of counsel. The Respondent is represented by Mr Andrew Midgley of counsel. We are grateful to both counsel for their written and oral submissions. In accordance with practice, we refer to Mr Ward throughout this judgment as the Claimant and the Secretary of State for Work & Pensions as the Respondent.

The factual background

4. The Claimant was employed by the Respondent on a permanent basis from 17 January 1994. He worked in Jobcentres. In about 2000, he developed Irritable Bowel Syndrome (IBS). The Respondent conceded that this amounts to a disability for the purposes of the **Disability Discrimination Act 1995**, as amended. His symptoms include frequent and urgent need to pass motions, and, sometimes, constipation and abdominal pain. There is no physical cause to his condition, which has been diagnosed as linked to psychological issues. He explained to the Tribunal that the condition was particularly bad in the mornings when he may have used the toilet frequently, but that had improved to some extent during the latter part of the day.

5. The Tribunal had before it a number of occupational-health reports obtained by the Respondent. They are dated: 4 May 2001; 24 June 2003; 7 January 2004; 1 March 2005; 31 August 2007; 11 December 2008; and 20 January 2009. There were also a substantial number of meetings between the Claimant and his managers over this period of time.

6. The Tribunal noted (paragraph 3.9) that the Respondent had a sickness policy. There are two relevant policies: one covering short-term absence called the Irregular Attendance Process; and another, governing longer periods of absence, called the Continuous Absence Process. The latter applied to absences of 28 days or more and was not applied in this case. The process that was applied to the Claimant was the Irregular Attendance Process. At paragraph 21 of the Attendance Management Policy, the stages in the policy were stated to be as follows:

(1) A warning was to be given when the employee reached a consideration point. At that point, they could be given a six month Review Period, during which their attendance must be acceptable. If attendance was acceptable within the Review Period, no further action would be taken except that the employee would be monitored for a further 12-month period called the "backsliding period".

(2) If attendance did not improve during the Review Period or during the backsliding period, the policy required that, if at any time during the review or backsliding period, attendance fell below the required level, the manager must move to the "considering dismissal" stage.

(3) Stage 3 requires the manager to refer the case to an "Independent Decision-Maker" to consider dismissal or demotion.

(4) The decision-maker would consider whether dismissal or demotion is appropriate after inviting the employee to a meeting. If no action was taken, attendance would be monitored for the remainder of the backsliding period.

7. The essential part of the policy was the "consideration point" which was the number of days of absence which were allowable before the process had to be implemented. Usually, this was 8 days, but extended periods were allowed in special periods. This is of special relevance to the Claimant's case. No processes were provided for in the policy to extend the period of the consideration point although the Tribunal was referred to a series of questions and answers, which were set out in the attendance management advice. Those provided for the relevant manager to increase the consideration point by a reasonable amount to take account of additional absences linked directly to a disability or underlying medical condition.

8. The Tribunal found that the Claimant's manager, Mr Nair, decided to disregard the IBS absences in accordance with the advice from Human Resources. This would mean that the Claimant was allowed the usual eight absences and that any absences because of IBS were not taken into account. There was no evidence in the file that this was ever explained to the Claimant. The Tribunal accepted the Claimant's evidence which was that he continued until 2007 to believe that he still had an additional 10 days because of his disability giving him a consideration point of 18 days.

9. In about 2007, the Respondent decided to address the issue of excessive sickness absence. It was agreed that for general purposes, procedures would be instigated against staff under the Absence Procedures after eight days' absence.

10. The Claimant was absent from work from mid-April 2006 until 27 February 2007 because of a combination of IBS and sleep apnoea. This absence was dealt with under the long-term absence procedure and no action was taken against the Claimant because of his absence. The Claimant returned to work on 27 February 2007 and arrangements were made for his travelling expenses to get to work, being dealt with under the Access to Work procedure. Arrangements were also made for temporary part-time working and an indication given that permanent part-time working could be accommodated. Subsequently, other adjustments were agreed, including a start time of 9.30am, which was later than other advisors, and a toleration of later starts due to bouts of IBS. The Claimant was also provided with seating when covering other floor managers, and allowed a later diary start than other staff.

11. The Claimant returned to work in his old position, which involved a lot of standing which he found difficult. At about the same time, the existing specialist Incapacity Benefit Personal Advisor retired through ill health. The Claimant applied for the post and was appointed. He received extensive training during which he was allowed to stay at a hotel even though the training centre was within commuting distance of his home. He was also allowed to run his own diary and to start his consultations with clients no earlier than 11.30am. His desk was placed reasonably close to a toilet for his personal convenience. The Tribunal found that the Claimant accepted that these were all helpful adjustments and, apart from the "question of the consideration point", there were no other adjustments which could reasonably have been made to assist him.

12. There followed various meetings between the Claimant and the Respondent on 5 June 2007 where he was subsequently told in writing by Mrs Willets that the Claimant's consideration point was 8 days rather than 18. The Tribunal found it impossible to understand how Mrs Willets could conclude that that was the case. There was a later meeting on 26

November 2007 with Mrs Willets about the Claimant's absences from work and the Claimant was given an oral improvement warning. There was a continuing disagreement between the Claimant and Mrs Willets about the Claimant's consideration point.

13. Mrs Willets was been succeeded by Mrs Ajaegbu as the Claimant's manager. At a meeting on 6 November 2008, Mrs Ajaegbu stated that the Claimant's attendance was not getting any better and that his consideration point was 13 days. The dispute over the number of days' consideration point continued. There was another meeting on 28 January 2009 between the Claimant and Mrs Ajaegbu. At that meeting, the Claimant confirmed that he was not taking medication for his IBS condition, stating that his GP had agreed with that.

14. Mrs Ajaegbu asked for advice about this information. She was advised that ATOS (which had taken over from the Respondent's own occupational-health department) be contacted to find out if it was reasonable or usual for people with IBS not to be receiving any medication. The advice went on to say that Mrs Ajaegbu should take into account the Claimant's decision not to take medication and the adjustments that had already been given, and, "that Shane does not appear to have taken reasonable measures to control his condition". Mrs Ajaegbu was advised that she was not obliged to raise the consideration point automatically and could look at arranging adjustments, and should look at the last OHS recommendation. With regard to increasing the figure, she should consider any medical evidence to that effect, together with what the business could support in regard to any increase.

15. The Claimant's grievance against the number of days' consideration point was dealt with at a meeting on 9 December 2008. Mrs Ajaegbu wrote to the Claimant on 13 February 2009 and confirmed that she had upheld her previous decision to issue a written warning for unsatisfactory attendance. She advised the Claimant that she had decided to leave his

consideration point as 13 days, and referred to the fact that the Claimant was now not taking any medication to manage his condition and that she had OHS concerns that the Claimant was not now actively managing his condition.

16. The Tribunal make this comment at paragraph 3.35 of its Reasons:

> **"To justify these comments Mrs Ajaegbu told us that she had had a conference with ATOS before writing this report. They have told her that they would not be contacting the GP themselves. Mrs Ajaegbu did not consider it necessary to ask the Claimant for permission to write to the GP herself. In the bundle is confirmation that the Respondent did not contact the GP to confirm what had happened. In view of the firm advice given by Ms Sterling, we find this somewhat surprising. It is the Claimant's case that his medication was not helping him, which, in view of the fact that it was a psychological condition, is perhaps not surprising. At the very least, we believe that the Respondent should have asked the Claimant to obtain the necessary confirmation from his Doctor that it was in order for him to cease taking his medication. Without such investigations it appears to the Tribunal that the Respondent formed an unjustified view that the Claimant was acting improperly in declining to take any medication.**

17. The Claimant was then off work from 2 March 2009 until 28 April 2009. This of course put him well over the 13 days' consideration point believed by the Respondent to be the appropriate trigger and the 18 days' trigger sought by the Claimant.

18. The Claimant's appeal against the dismissal of his grievance was dismissed by a Ms Mitchell on 22 May 2009. She found that it was reasonable to issue the written warning and the additional five days added to the consideration point was a reasonable approach to the situation.

19. On 26 May 2009, there was a formal sickness absence meeting held by Ms Gayle, the Claimant's new manager. There was a general discussion of the situation and its history and, by letter dated 9 June 2009, Ms Gayle referred the matter to a decision-maker on the grounds that the Claimant had "been unable to meet the attendance standard the Department expects".

20. The decision-maker was a Mrs Hartnett. She had a meeting with the Claimant on 11 August 2009. There was a long discussion. The Claimant's case was that he wished to have the ten additional days before he reached his consideration point.

21. By letter dated 28 August 2009 Mrs Hartnett issued a decision. She said this:

> **"[…] following our meeting on Tuesday, 11 August, 2009, I have considered all the facts of your case and have decided that as your absence can no longer be supported, I must dismiss you."**

22. Mrs Hartnett believed that the setting of a consideration point five days higher than usual was appropriate in all the circumstances but, despite this, the Claimant had failed to achieve an acceptable level of attendance. She advised the Claimant that he was entitled to 13 weeks' notice and that the effective date of dismissal would therefore be 27 November 2009.

23. The Tribunal found that the question of the Claimant declining to take medicine was a factor in Mrs Hartnett's mind since she specifically referred to it. She did not ascertain whether the Claimant was justified in so doing by checking with his GP. To that extent, the Tribunal found that her conclusion was unjustified. The Tribunal referred to the fact that they put that point to her, and Mrs Hartnett told the Tribunal that it had not affected her decision to dismiss the Claimant but related purely to her decision to reduce the amount of compensation under the Civil Service Scheme. The Tribunal was satisfied by that evidence that Mrs Hartnett's decision would have been exactly the same even if this factor had been absent. It was a factor which only affected the assessment of compensation under the scheme which was outside the Tribunal's remit: Reasons paragraph 3.41.

24. The Claimant appealed Mrs Hartnett's decision, but his appeal was dismissed.

The Employment Tribunal's conclusions

25. The Employment Tribunal's conclusions were as follows:

> **"11. We start by considering the complaint of failing to make adjustments. The only adjustment which the Claimant argues before us is that he should have been allowed an extended consideration time. He agrees that the other adjustments made by the Respondent satisfy all his other requirements. He argues for a period of 10 days when the Respondent was only prepared to make an adjustment of an extra five days. The difficulty which we have is in assessing what is a reasonable adjustment. The Respondents have chosen a period of 5 days which they have arrived at by taking an average of the Claimant's absences between 2002 and 2008. They also point to the impact that the Claimant's absences have had upon their service. In arriving at a figure of 5 days they have decided upon an average of the time which the Claimant had taken off because of his IBS. This average, of course, varies from time-to-time. By the end of November 2008 the Claimant had had 37 days' absence over a period of 6 years. This gives an average of 6.15. We also have to be conscious that the Claimant's long term, as opposed to short term, absences, were frequently connected with his IBS although there were other factors in these absences, but have not been included in the averaging. If we were to factor these absences in as well we would arrive at a much higher figure. It seems to us somewhat arbitrary to exclude these absences and only to include the casual absences which occurred in between the periods of long term absence. However, the Claimant asked for no more than 10 extra days and we therefore feel entitled to take that as the maximum period. We also have to note that if we had included the long term absence the average would be at such a high figure that it would have been unsustainable on a reasonable basis. The importance of this factor is that the taking account of only short term absences was a fairly arbitrary exercise.**
>
> **12. We would certainly accept that if he was allowed the opportunity to have additional days off this would, to some extent, reduce the stress he was under of fearing that he might lose his job because of his condition. We also accept that the stress increased the likelihood of the IBS symptoms and the Claimant was, therefore, in what he describes as a 'vicious circle'. However, there is a limit to the amount of additional absences [sic] which a reasonable employer can expect to accept and we are, for the purposes of this consideration, prepared to consider that as being 10. This gives a total of 18 days in all which is a very considerable period of absence above normal.**
>
> **13. In deciding what is reasonable we also have to consider carefully the Respondent's evidence about the difficulties which his absence caused their service. Section 18B of the Act sets out various matters which we have to consider in this connection.**
>
> > **13.1 Section 18B(1(a) requires us to consider whether the step would prevent the effect in relation to which the duty is imposed. We find that there was every prospect that it would because the stress which we have mentioned above would have been reduced. This in turn would have reduced the incidence of IBS.**
> >
> > **13.2 Under 18(b)1(b) [sic] we had to consider the extent to which it was practicable for them to take this step. It was not suggested that it was impracticable.**
> >
> > **13.3 The Respondent's main argument related to the provisions of 18(b)(1(c) [sic] which was the,**
> >
> > > **'financial and other costs which would be incurred by him in taking this step and the extent to which taking it would disrupt any of his activities'.**
>
> **14. Essentially, it was the disruption to their activities which the Respondent relied upon. We have listened carefully to their evidence about these difficulties. We note, however, that during the Claimant's long term absences no steps were taken to fill his post by secondment or obtaining a temporary employee. The same situation appears to have occurred during his predecessor's absences. Whilst we have to accept that his specialist services would not be provided to the Respondent's customers, there is no indicate [sic] that there was a pressing need for this to be done. Whilst there was disruption by reason of his absence we do not consider that a further 5 days would have caused an insurmountable problem.**
>
> **15. The Respondent did, of course, make an adjustment of an additional five days' absence. It is difficult to see on the evidence before us how this was done. Certainly by November 2008 the average absence incurred by the Claimant exceeded 5 days. Having considered the whole**

of the evidence we have become convinced that the period of 5 days originated in the letter of 9 March 2005 when 5 days was put forward as an example of the adjustments which could be made. We have formed the opinion that the Respondent had subsequently adopted that figure and thereafter endeavoured to justify it rather than assess what was the appropriate number of days for a reasonable adjustment. We are confirmed in this view by the comments attributed to Mr Keys which shows that the Respondents had a fixed view about the Claimant which was that he would take whatever period of absence was allowed to him. No doubt the lengthy absences caused some difficulty but we are not convinced that the Respondent carried out an in depth appraisal of what would be appropriate or what the business could bear.

16. However, when we turn to consider what we would consider to be a reasonable adjustment we find the position to be very complex. We cannot just pick a figure from the air on the basis of what we think might be fair. We have to base our assessment on evidence. The best evidence in this situation is medical evidence. The only evidence of that sort is contained in the Occupational Health reports. Their fairly unanimous view was that future absence should be assessed on the basis of past absence. We have already pointed out that in November 2008, on that basis, an [sic] Consideration Point of 6 days would have been appropriate. On the other hand if we assessed his absences in the period between 2005 and 2008, after his return from long term absence, the average would be based on two years' absence and would be 8 days.

17. We also have to consider the clear advice which was given to the Respondents that IBS was made worse by stress. It is clear from the documents that the Respondent realised that the pursuit of the attendance process would cause stress which would in turn have an adverse impact on his IBS and accordingly on his attendance. It must have been appreciated that pursuing the Attendance Procedure would inevitably have increased his absence due to the stress caused. However, even if this situation is the result of the Claimant's disability, it is not reasonable to refrain from attendance procedures altogether. There is a point at which it becomes unreasonable to have to make further adjustments. We also have to bear in mind that the Respondent made a number of adjustments which the Claimant readily accepted and had greatly assisted him. The Consideration Point was not the only relevant adjustment. It was one part of a package.

18. We also consider that there is a continuing need for an employer to reassess the nature of the adjustments. They are not arrangements which can be made and left unconsidered forever. They need to be reconsidered in the face of changing circumstances. Based on the last three years of the Claimant's employment, a figure of 8 days would have been a more appropriate average. It would achieve the results necessary by reducing stress and in turn reducing the risk of the Claimant losing his employment because of his absences. The reduction in stress could reasonably be expected to reduce his IBS symptoms and therefore improve his attendance.

19. We have also considered the argument put forward by the Claimant that 10 days would be the appropriate period. This argument was based on the fact that this was agreed prior to 2005 and there had been no substantial change in the circumstances since then. This is, of course, a persuasive argument. However, it is not based on the medical advice which was to work on an average.

20. We have considered all of these factors in trying to come to a conclusion as to what would be appropriate. However, we remind ourselves that we do not necessarily have to decide, for this purpose, what would be the appropriate reasonable adjustment. We have to decide whether the adjustments which the Respondent made were reasonable. On that basis we have decided that the 5 days adjustment [sic] made by the Respondent was not reasonable. It did not reflect the average of the Claimant's absence, especially in late 2008 and 2009. If we had to decide on the appropriate period, we would have considered 8 days as a reasonable period balancing the additional pressure which the Claimant's absence put upon the Respondent and their resulting inability to provide disability advice to their customers against the additional stress caused to the Claimant. However, by allowing 5 days we find that the Respondent did not make a reasonable adjustment and that is sufficient basis upon which to find that they failed to comply with their obligation in Section 3A(2). We do, however, wish to record that this decision takes account of the fact that there must be a point at which absence becomes intolerable. It is difficult to pin point this within a small range. We feel however, that 8 days does not approach that point whereas 10 days may well have done.

21. We accordingly find that the Respondents have failed to make reasonable adjustments for the Claimant.

Disability related Discrimination

22. We next have to consider the question of disability related discrimination. There are three issues to decide upon:

> **22.1 The first is that the Respondent failed to put in place a Consideration Point of 18 days between 26 November 2007 and 27 November 2009. It is factually correct that the Respondent failed to do this. The difficulty which the Claimant has is that he has not given any evidence of comparators. As already indicated the decision in *Malcolm* requires us to compare the treatment afforded to the Claimant with that afforded to others. We have not received any evidence as to which had happened to others or upon which we could construct a hypothetical comparator who had been treated differently. It is not sufficient for the purpose of constructing a hypothetical comparator merely to refer to the previous Consideration Point allowed to the Claimant. The Claimant cannot be his own comparator. Even on the basis that the Claimant was allowed 5 extra days on his Consideration Point, he appears to have been treated more favourably than any other employee about whom we heard. On that basis, therefore, we must find that the Claimant has failed to satisfy us that the failure to allow him consideration of 18 points constituted treatment which was less favourable than the way in which the Respondent treated or would treat others to whom that reason does not or would not apply. For this reason, therefore, this complaint must fail and is accordingly dismissed.**
>
> **22.2 The second issue is the decision to issue the Claimant with a written warning on 24 November 2008. This warning was given because the Claimant at that time had exceeded the Consideration Point afforded to him. This was already 5 days higher than that given to other staff. We have again received no evidence about how other staff were treated or how they would have been treated. Therefore, for the same reasons as above, we must find that this complaint is also not well founded and must be dismissed.**
>
> **22.3 The final complaint is that his dismissal constituted disability-related discrimination. He was dismissed for absence which exceeded by some way the norm allowed to other staff. No evidence was given as to how other staff were treated in this situation or how they would have been treated. In the absence of that evidence we are unable to find, for the reasons set out above, that the complaint is being made out. We find it not to be well founded and it is accordingly dismissed.**

We do not have to take into account in this decision that the Respondent has been found not to have made a reasonable adjustment, since that is only referable to an attempt by a Respondent to justify their action which has otherwise been found to be discriminatory. The Claimant's complaints of disability related discrimination are accordingly dismissed.

Unfair dismissal

23. The Claimant was dismissed for capability reasons which is a potentially fair reason under section 98(1)(2) [sic] of the Employment Rights Act 1996. We are satisfied that this has been shown to us by the Respondent. We then have to consider whether the dismissal is fair for the purpose of section 98(4). The key to fairness in such cases is a fair procedure. Such a procedure requires, in particular,

> **(i) Consultation with the employee;**
>
> **(ii) A thorough investigation of the medical situation and the reason for the absences;**
>
> **(iii) Consideration of other options.**

24. We have set out in our findings the details of the various consultation procedures and appeals which the Respondent went through. Whilst the Claimant argues with the decisions reached in those matters he does not argue about their inherent fairness. His views were certainly consulted at every stage of the procedure, even though they were not accepted. There was a fair procedure with various stages provided in it. There was a general allowance of 8 days for sickness absence, which the Respondents had increased to 5 days in the case of the Claimant. He was therefore given every opportunity of showing that he could attend work on a regular basis. In connection with unfair dismissal we had to disregard the provisions for Disability Discrimination Act. These we have considered separately but they are immaterial for the purposes of unfair dismissal.

25. The Respondent's Occupational Health department regularly assessed the Claimant and produced reports with which the Claimant did not essentially take issue. There was no doubt that the Respondent knew about the Claimant's IBS and the reasons for its absences. Indeed

it is noteworthy that they tolerated absences in excess of what they had agreed when taking into account his long term absences.

26. Consideration was given to alternative employment. He was moved from his position from managing counter staff to being a disability adviser, a job which he accepted was compatible with his difficulties. Other adjustments were also made as set out above. None of these procedures have any element of unfairness.

27. There were, however, some areas of potential unfairness in what happened. The reduction of the Claimant's Consideration Point from 18 to 13 was carried out in a cavalier manner, as we have described. If this decision had lead [sic] directly to his dismissal then there would have been unfairness. However, the Claimant was for a very lengthy period aware that his Consideration Point had been reduced and spent some considerable time and effort in appealing and contesting that decision. He was, therefore, aware of the Respondent's position at all material times. We do not find, therefore, that that is a matter of continuing unfairness which affected the dismissal itself.

28. We have also noted the failure of Mrs Ajaegbu to obtain an Occupational Health report before giving the Claimant the written warning. In a perfect world she would have done so. However, we accepted her evidence that she would have reviewed her decision should the Occupational Health report reveal matters which should be taken into account. We are satisfied that she would have done so. Whilst the Claimant believes that Mrs Ajaegbu was biased against him, we do not find that this was so. She was charged with managing his attendance deficiencies, which in the circumstances must have been difficult and stressful, since she had to administer the tougher approach to absence which her senior management had imposed upon her. We have seen the Occupational Health report and it did not show any matters which could have affected her decision. We do not, therefore, find that her action was unfair.

29. Finally, we note that Mrs Hartnett took into account the fact that the Claimant had ceased taking his medication. We have found that decision to be unjustified without the position being checked with his GP to see if this was done on medical evidence. This could have been an area of unfairness if it had affected her decision. We note from the wording of her decision, however, as confirmed in her evidence, that this aspect of the matter only affected her decision to reduce his compensation under the Civil Service Scheme. We are satisfied that her reason for dismissing him was his continuing absence in excess of the figures allowed. Again, we find that this does not constitute an act of unfairness.

30. We have also been asked to consider whether there was a general bias against the Claimant. We have been referred to the comments of Mr Keys as evidence of this. Mr Keys was not called to explain his views. It is certain that the Respondent had decided to take a more stringent line on absence. There is nothing unfair in that, and it is a duty of management to manage such absences. The ultimate tool in such management is the threat of dismissal and, eventually, if there should be no improvement, actual dismissal. We have had to judge the conduct of those actually managing the process with the Claimant. We have found no bias in them against the Claimant.

31. Taking all these matters into account we have come to the conclusion that there was no unfairness in the Claimant's dismissal. He was dismissed for exceeding, by some way, the permitted levels of absence which were, in themselves, quite generous. A fair and proportionate procedure had taken place over a period of two years. The Claimant's attendance had not improved. In the circumstances we find that the Claimant's dismissal was not unfair and his complaint is accordingly dismissed."

The Notice of Appeal

26. There are six grounds of appeal in the Notice of Appeal. We take each in turn:

Ground 1

27. The Employment Tribunal erred in law in that it misdirected itself or failed to apply **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337.

28. Mr Elesinnla refers us to the judgment of Lord Nicholls in that case at paragraphs 7-12. He submits that the Employment Tribunal failed to concentrate on "the reason why" the Claimant was treated in the way that he was, rather than researching for the identification of a comparator to compare the Claimant's treatment too.

29. Mr Elesinnla makes the same submission for ground 3 where the Employment Tribunal asserted in paragraph 10 of its Reasons that the failure of the Claimant to prove that his treatment was less favourable than that "afforded to others". That is an essential requirement to section 3A(1), and we did not consider that we can ignore it. He again points us to paragraphs 7-12 of **Shamoon** as well as paragraphs 51-52 per Lord Hope in the same case.

30. Mr Elesinnla submits that the misdirection, which is identified, affected the Employment Tribunal's conclusions at paragraphs 22.1, 22.2 and 22.3 where the Employment Tribunal concluded that the lack of evidence as to how the Respondent treated or would treat others to whom that reason does not or would not apply was fatal to his complaint. He submits that if the **Shamoon** approach set out above had been adopted, the Tribunal would have reached a different conclusion.

31. Mr Midgley submits that submission is misconceived for a number of reasons. First, **Shamoon** is of little application to this case because it is centred on a claim of direct discrimination whereas this is a claim under section 3A(1) of the **Disability Discrimination Act 1995**, as amended. Second, the proper approach to claims under section 3A(1) and the

nature and need for a comparative exercise was set by the House of Lords in **London Borough of Lewisham v Malcolm** [2008] 1 AC 1399 at 1047C-1048A per Lord Bingham. Third, even if **Shamoon** was of direct application to a claim under section 3A(1), it only proposes guidance as to an approach that may be taken where the circumstances make it appropriate (per Lord Nicholls at paragraph 12). Fourth, this is not a case where such an approach is appropriate. The issue is whether the Claimant was treated less favourably than an individual who did not suffer the disability in question and, if so, whether the treatment was justified.

32. We agree with Mr Midgley's submissions. In this case, the Tribunal correctly identified:

    (i) the general need for a comparative exercise following **Malcolm** (Reasons, paragraph 8);

    (ii) the particular need for an appropriate comparator in cases of capability dismissal (re Reasons, paragraphs 8 and 10);

    (iii) the possibility that the comparator could be a hypothetical one if no actual comparator could be found (Reasons, paragraph 9); and

    (iv) that the Claimant was treated more favourably than any other employee about whom they had heard (Reasons, paragraph 22.1).

33. It had made the necessary findings to support that conclusion in the following respects:

    (i) that the appropriate process was the Regular Attendance Policy (paragraph 3.9);

    (ii) that the Respondent's policy allowed for the consideration point to be increased where absences were linked directly to a disability or an underlying medical condition, but for those not so affected the policy provided for formal action to be taken once the consideration point had been reached (paragraph 3.10);

(iii) that the policy was applied to the Claimant, and, in particular, that the backsliding requirement to consider a rolling 12-month period was in accordance with the policy (paragraphs 3.9 and 3.17);

(iv) that the Respondent was addressing the issue of excessive absence amongst its staff and in consequence for general purposes procedures would be instigated against staff under the policy after eight days' absence (paragraph 3.13);

(v) that the Respondent paid close attention to excessive absence, and that as part of that it was appropriate that the Claimant's line manager spoke every week to a member of HR about staff who had not maintained a good attendance record (paragraph 3.27);

(vi) that an adjustment to the consideration point of ten days had been agreed in 2002 (paragraph 3.3);

(vii) that periods of the Claimant's absence that were related to his IBS had been disregarded (paragraph 3.11 and later);

(viii) that the application of the policy in the Claimant's case would have led to him receiving an oral improvement warning, given the rolling 12-month policy, even with 10 days of IBS-related absence, to be discounted from the consideration point (paragraph 3.21); and

(ix) that the Tribunal rejected the suggestion that either the conduct of the Claimant's line manager, Mrs Ajaegbu, or "the conduct of those actually managing the process with the Claimant" revealed "bias in them against the Claimant" (paragraphs 28 and 30).

34. As the Tribunal pointed out, the Claimant was unable to point to an actual comparator. The findings of the Tribunal were sufficient for it to identify a hypothetical comparator and to determine that the comparator would not have been treated more favourably than the Claimant.

On the Claimant's best case, the comparator may have received identical treatment, given that the Respondent's policy allowed for adjustments to be made to the consideration point where an employee had an underlying medical condition but did not have a disability. There was no evidence to support a submission that the comparator would have been treated more favourably.

Ground 2: misdirection as to the burden of proof

35. This ground of appeal concerns the second part of paragraph 10 of the Tribunal's Reasons, where it said this:

> **"If however the Tribunal is not satisfied with that explanation and finds that there are some inferences that the treatment was on the grounds of the Claimant's disability, it still seems to the Tribunal that it is necessary for the Claimant to show that his treatment has been less favourable than that afforded to others. That is an essential requirement of section 3A(1) and we do not consider that we can ignore it. This must be the case even more so in complaints under the Disability Discrimination Act where quite clearly the reasons [sic] for the dismissal was absence due to the difficulties caused by his disability."**

36. Mr Elesinnla submits that paragraph 10 of the Employment Tribunal's Judgment contains a further error of law, in that if the Employment Tribunal had considered the totality of the evidence had led to a situation where there were inferences that could lead it to conclude that the Respondent had indeed contravened section 3A(1) of the **Disability Discrimination Act** as amended, then the burden of proof would pass to the Respondent to prove that the treatment was "in no sense on the grounds of disability". He submits that the Claimant had established that he had been subjected to treatment in contravention of the Act, in that the Respondent had failed to make a reasonable adjustment in respect of the consideration point and had refused to engage with his argument that an arbitrary reduction of that consideration point was unjust and unlawful, which caused him stress. Mr Elesinnla refers us to the well-known authority of **Igen Ltd and Ors v Wong** [2005] ICR 931 and in particular paragraph 51, per Peter Gibson LJ.

37. Mr Midgley submits that the passage cited above reveals no error of law. The Tribunal referred to "inferences", not prima facie evidence, of discrimination. It is established law that the reverse burden of proof provided for in section 17A(1)(c) of the **Disability Discrimination Act 1995** requires a Claimant first to prove *facts* from which a Tribunal could conclude discrimination (**Igen**, supra, and **Madarassy v Nomura International PLC** [2007] ICR 867, affirmed by the Supreme Court in **Hewage v Grampian Health Board** [2002] ICR 1054 at 1063G-1064A). Inferences alone are not sufficient to cause the burden of proof to transfer.

38. In our judgment, the Employment Tribunal rightly stated that, "[…] it is necessary for the Claimant to show that his treatment has been less favourable than that afforded to others". Inferences are not enough. In our judgment, the Tribunal has not misdirected itself on the burden of proof or failed to apply its mind properly to the evidence. A passage that was not cited to us in submissions was paragraph 25 of the Judgment of Lord Hope on **Madarassy**, with whom the other Supreme Court Justices agreed, in the **Hewage** case, where he said this:

> **"[…] the purpose of that assumption is to shift the burden of proof at the second stage. It does not diminish in any way the burden of proof at the first stage, when the tribunal is looking at the primary facts that must be established. As Peter Gibson LJ said in para 17 of his judgment in that case [*Igen*], the first stage requires the complainant to *prove* the facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant."**

Ground 4: unfair dismissal

39. Mr Elesinnla complains that the Employment Tribunal's decision on the unfair dismissal claim failed to take into account the following matters:

(i) its finding in relation to disability discrimination and reasonable adjustments;

(ii) the fact that the Respondent consistently ignored the Claimant's complaints that he was being discriminated against contrary to the **Disability Discrimination Act** in relation to his consideration point;

(iii) the additional stress that the Claimant suffered as a result of the Respondent's refusal to properly consider his arguments in relation to his consideration point and the lawfulness of its treatment of him and how that exacerbated his IBS, which in turn caused him to have even more time off than he otherwise would have; and

(iv) the Respondent's arbitrary treatment of the Claimant in relation to the consideration point issue.

40. Mr Midgley submits that this is a veiled perversity appeal, to which the very high threshold required in **Yeboah v Crofton** [2002] IRLR 634 applies.

41. We agree. Our analyses of the four points raised by Mr Elesinnla are as follows:

(i) There is simply no evidence to support this contention. As the Tribunal record, the only reasonable adjustment contended for by the Claimant was the appropriate consideration point. The Employment Tribunal considered this at paragraphs 17, 18 and 20 of its Reasons. The Tribunal found that the appropriate adjustment to the consideration point was eight and not ten days. It follows that the policy requirement to consider a rolling 12-month period would have resulted in the Claimant receiving an oral improvement warning and attending a meeting at which one reasonable and fair outcome would have been his dismissal on the same dates as he did. The Tribunal clearly had these findings in mind when reaching its conclusion at paragraph 31.

(ii) This was not a case of direct discrimination. The Tribunal expressly considered the Claimant's arguments that the Respondent demonstrated bias towards him in its decision to dismiss and rejected it: re Reasons paragraphs 28 and 30. The evidence was considered, weighed and rejected.

(iii) This was expressly considered at Reasons paragraph 17, where the Tribunal noted that whilst pursuing the attendance procedure would have increased the absence due to the stress that was caused, "it was not reasonable to refrain from attendance procedures altogether. There is a point at which it becomes unreasonable to have to make further adjustments". The issue was quite clearly in the Tribunal's mind when it considered the fairness of the dismissal.

(iv) This was expressly considered at Reasons paragraphs 15, 18 and 20. It was clearly in the Tribunal's mind when considering the fairness of the dismissal.

42. There is no basis on which it can be said that there was perversity in this case.

Ground 5: failure to take into account that the Respondent refused to provide the Claimant with information relating to comparators despite previously promising to do so

43. At the conclusion of the hearing on 26 November 2012, we made a **Burns-Barke** remission to the Employment Tribunal. We asked two questions about Ground 5 of the Grounds of Appeal. Those questions were:

(i) Did the Claimant make an argument based on ground 5 of the Notice of Appeal?

(ii) If the Claimant did make such an argument, what conclusion did the Employment Tribunal come to?

44. The Employment Judge replied by letter dated 23 January 2013 to the effect that he had no record in his notes that the issue raised by ground 5 of the Grounds of Appeal was raised

before the Employment Tribunal either in evidence or in the closing submissions of counsel for Mr Ward. The EAT sent copies of the Employment Judge's letter of 23 January 2013 to both counsel who appeared before us and in a written submission Mr Elesinnla quite properly concedes that in the light of that letter from the Employment Judge, it is going to be extremely difficult to raise the matter on appeal and in those circumstances he withdrew ground 5.

Ground 6: failure to draw inferences from its own findings of fact and/or adopting the "fragmented" approach

45. We agree with Mr Midgley that this is a perversity ground of appeal and does no more than repeat grounds 3.1, 3.2 and 4. There is no perversity here. The approach of the Employment Tribunal was the correct approach.

Other matter

46. In his written submission made after receipt of the letter from the Employment Judge Mr Elesinnla raises a further matter. He refers us to what the Employment Judge said at paragraphs 4-5 of his letter dated 23 January 2013 where he said this:

> **"4. In his oral submissions made in support of the written submissions he [counsel for Mr Ward] again indicated that he agreed with the Malcolm approach. He stated that the Claimant relied upon the Respondent's negative attitude and that they had made stereotypical assumptions with regard to the Claimant. He emphasised that it was not necessary for the Claimant to prove a comparator following the suggestions made in *Shamoon*. He also accepted that there were no actual comparators and that there was no evidence regarding hypothetical comparators.**
>
> **5. Despite these concessions we considered whether we consider identifying a hypothetical comparator. Our approach and decision on this point are recorded at paragraphs 9 and 22.1 of our judgment."**

47. Mr Elesinnla submits that these comments is an attempt to deal with a completely different ground of appeal and, if anything, support the proposition that the ET took its eye off the ball when searching for a real hypothetical comparator. It is an error of law and principle to say that a discrimination complaint cannot succeed without a real or hypothetical comparator.

We have dealt with this submission already under Ground 1. There is nothing in the comments made by the Employment Judge or in Mr Elesinnla's written submission upon it, which persuades us that the Employment Tribunal were in error in its correct approach to **Shamoon**.

Conclusion

48. For these reasons, the appeal is dismissed.